

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. MICHAEL J. McSHANE, JUDGE PRESIDING

4
5 MICHAEL SHUBIN,)

6 Plaintiff,)

7 v.)

) No. 6:15-CV-00289-MC

8 REEDSPORT POLICE OFFICER A.)
9 GARDNER, in his individual)
10 capacity; REEDSPORT POLICE OFFICER)
11 JON HOLDER, in his individual)
12 capacity; REEDSPORT POLICE OFFICER)
13 RYAN FAUVER, in his individual)
14 capacity; and the CITY OF)
REEDSPORT, a municipality,)
incorporated in the State of)
Oregon,)Defendants.)
_____)

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 EUGENE, OREGON

17 MONDAY, MAY 2, 2016

18 PAGES 1 - 27

19
20
21
22 Kristi L. Anderson
23 Official Federal Reporter
24 United States Courthouse
25 405 East Eighth Avenue
Eugene, Oregon 97401
(541) 431-4112
Kristi_Anderson@ord.uscourts.gov

1 APPEARANCES OF COUNSEL:

2
3 FOR THE PLAINTIFF:

4 Sean J. Riddell
5 1300 SE Stark St, Suite 208
6 Portland, OR 97214
7 971-219-8453
8 Email: sean.riddell@live.com

9 FOR THE DEFENDANTS:

10 Gerald L. Warren
11 Law Office of Gerald L. Warren and Associates
12 901 Capitol Street NE
13 Salem, OR 97301
14 503-480-7252
15 Fax: 503-779-2716
16 Email: gwarren@geraldwarrenlaw.com

17
18
19
20
21
22
23
24
25
WITNESS INDEX

WITNESS	DIRECT	CROSS	REDIRECT
Kenn Meneely	3	16	26

EXCERPT OF PROCEEDINGS

TESTIMONY OF KENN MENEELY

MONDAY, MAY 2, 2016

THE COURT: All right. With the exception of our next witness, everybody can have a seat, and the witness will be sworn.

THE CLERK: Please be seated. State your name for the record, spelling your last.

(The witness was sworn.)

THE WITNESS: My name is Kenn Meneely,
M-E-N-E-E-L-Y.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. RIDDELL:

Q. Good afternoon, sir.

A. Good afternoon.

Q. Mr. Meneely, what do you do for a living?

A. Currently, I am a private forensic consultant.

Q. And where did you get your education?

A. Well, to begin with, I have a bachelor's degree in chemistry; studied organic biochemistry and pharmacology in graduate school.

I worked for four years in a medical and research facility prior to entering the state police crime laboratory about 37 years ago.

1 Prior to that, three or four years was spent with
2 the military's chemical and biological warfare division,
3 researching various applications and nerve agents and
4 blister agents and so on.

5 I attended the Oregon State Police Academy and
6 received both my basic and advanced police officer
7 certifications, which I maintained throughout the course of
8 my career.

9 Once again, 37 years ago I transferred from the
10 patrol division to the crime lab division, where I
11 subsequently received training from the forensic division,
12 the FBI, the University of Texas Medical School, and the
13 University of Utah, Center for Human Toxicology.

14 I have over a dozen publications in the area of
15 forensic toxicology regarding the clinical effects of drugs
16 alcohol, and medications. Also, my research has been cited
17 in forensic toxicology textbooks. Also research work with
18 Dr. Karl Citek, which is the -- what's called a drug
19 recognition evaluation program in Oregon, who is the
20 instructor for the ophthalmology course.

21 For the last eight years I was also a state
22 certified clinical laboratory director for a drug and
23 alcohol rehabilitation facility where I not only analyzed
24 patient's specimens but had one-on-one contact with the
25 patients during the course of their treatment.

1 Over the last 37 years, I have provided training
2 to such groups as prosecutors, judges, police officers,
3 prosecutors -- prosecutors and defense attorneys, all kinds
4 of law enforcement in the area of forensic toxicology.

5 I was a primary lecturer in the area of forensic
6 toxicology in the Oregon State Police program called the
7 Drug Recognition Evaluation Program for about 20 years and
8 which teaches officers the clinical effects of drugs and
9 alcohol, medications as well.

10 During my career with Oregon State Police Forensic
11 Division, I was involved with various aspects of both blood
12 alcohol and breath alcohol testing, which included
13 controlled dosing studies, absorption/dissipation studies,
14 the validation of the breath testing devices called the
15 Intoxilyzer 4000, 5000, 8000 models, if you will, of the
16 devices. And part of that was the control studies,
17 controlled dosage studies. As part of the breath testing
18 work was also going through the field sobriety testing,
19 along with the validation studies of that program.

20 Up until my retirement from the State Police Crime
21 Lab as a division toxicology technical leader and supervisor
22 responsible for the procedures, proficiency testing, and
23 also the training of the forensic scientists as well, I was
24 what was called an ASCLD inspector. That's American Society
25 of Crime Lab Directors. I was responsible to go to other

1 forensic lab divisions outside of Oregon and medical,
2 examine their laboratories as well for accreditation.

3 I stay current in my field by my association to
4 professional organizations as well as the state crime lab
5 forensic and medical journals and textbooks and other
6 various sorts of technical literature as well.

7 I've been recognized in Oregon for my
8 participation and research in the area of forensic
9 toxicology and impaired driving issues, from the Oregon
10 Prosecutor's Association, the DUI task force and DRE task
11 force as well. My CV is about 14 pages if you want that.

12 Q. Thank you, sir.

13 Sir, as part of your profession now, are you
14 compensated for your time in providing forensic expertise?

15 A. I am.

16 Q. Okay. Is some of that being involved in the testimony
17 at trials, whether civil or criminal?

18 A. It is.

19 Q. And can you give us a percentage of how much of your
20 income is related to testifying in civil cases like this?

21 A. I can give you an estimate. The last two years I have
22 testified in two civil cases, so a very small portion.

23 Q. And you are being compensated for your time here today?

24 A. I am.

25 Q. Do you remember how much that is?

1 A. Well, not for this work today, but for the entire
2 research, the report, and as far as consultation and the
3 time spent, I believe it was -- best of my recollection is
4 \$2,000. It may have been 2500. I don't remember.

5 Q. Okay. Sir, what information have you reviewed in
6 preparation for your testimony and your consultation on this
7 case?

8 A. I was sent by your office the Reedsport Police
9 Department case files. There was a supplemental report by
10 Officer Holder and a deposition by Officer Holder and just
11 recently a video of the incident.

12 Q. Upon reading the reports of Mr. Holder, the deposition
13 of Mr. Holder, and viewing the video of the HGN conducted by
14 Mr. Gardner and Mr. Holder, were you able to form an opinion
15 about whether Officer Holder correctly administered the
16 horizontal gaze nystagmus on Mr. Shubin?

17 A. I have.

18 Q. Well, let's begin with the video.

19 Can we go to my computer here?

20 I can represent to you that that's Mr. Shubin and
21 that is Mr. Gardner there preparing to give him the HGN.

22 THE CLERK: Do you have your phone?

23 MR. RIDDELL: That might be my computer feedback.

24 Hold on. Is that better?

25 BY MR. RIDDELL:

1 Q. All right. So we are going to take a step back here.

2 As I said, I can represent to you that's
3 Mr. Shubin and Mr. Gardner.

4 On seeing the video -- can you see the video where
5 you are at?

6 A. I can.

7 Q. Okay. What jumps out at you as violations of the HGN
8 standard tests as you look at the video right now?

9 A. Well, probably describe it first. The HGN test is
10 three separate or distinct tests, if you will, or segments.

11 First, there is what's called the lack of smooth
12 pursuit, and keep in mind that this is a very standardized
13 procedure, and it's standardized so that every officer does
14 it exactly the same way with no alterations, amendments, or
15 variations and the results -- because it's standardized, all
16 the results are validated based upon the standardization; in
17 other words, everybody does it exactly the same way every
18 time.

19 The first part of the HGN test, HGN is effectively
20 describing the eye movements. There are small vibrations to
21 the eyes when this HGN test is done. The first part is
22 called lack of smooth pursuit. The officer have will the
23 individual stand up with the hands at one's side, feet
24 together, and they'll hold up a pen, a pencil, or a small
25 penlight 12, 15 inches away from the bridge of their nose,

1 and they are instructing the individual to follow it, not
2 with their head, the head is to remain still, follow with
3 their eyes the stimulus or the finger.

4 The point is, is that under standardized rule,
5 that you can only go -- the stimulus can only go so fast; in
6 other words, it can only go about two seconds to the right,
7 back to the center, and two seconds to the left. And they
8 repeat this maneuver once again. So, in other words, a
9 total of four seconds from extreme left to extreme right.
10 They will do this test, once again, twice.

11 The second part is called nystagmus at maximum
12 deviation. And similar to the first test, the stimulus is
13 still 12 to 15 inches away from the bridge of the nose. And
14 in this test, the stimulus goes to the far side; in other
15 words, about as far as a person can actually see where the
16 whites -- the corners of the whites of the eyes just barely
17 disappear. And that finger is held there for four seconds.

18 And the officer is looking for the eyes to start
19 to vibrate. Many describe it as windshield wipers going
20 across a dry windshield. They start to vibrate as they do
21 this. And that's what the officer is looking for, that the
22 eyes are starting to -- I say vibrate or twitch.

23 And in both cases, whether the lack of smooth
24 pursuit or the nystagmus at maximum deviation, you are still
25 looking for the eyes to twitch.

1 The last part, the third part of the test, is
2 called angle of onset prior to 45 degrees. Once again, the
3 officer will slowly move the stimulus the same distance from
4 the head out to where the eyes just barely start to twitch;
5 in other words, prior to 45 degrees, and the officer will
6 measure that based upon the angle to shoulder straight up
7 the nose to 45 degrees, and if they start to, I say, twitch
8 the sooner they start to twitch, generally the higher the
9 alcohol level, or once they get out to close to the 45
10 degrees, the lower the alcohol level in a person.

11 Q. Back to the video.

12 What stands out as you look at this video as
13 possibly affecting or that the test had been done correctly
14 or incorrectly?

15 A. If you could stop it just momentarily there.

16 One of the aspects of horizontal -- or doing this
17 test, in ideal conditions, when you do it in controlled
18 conditions, it's room light or daylight conditions and very
19 little distractions, if you will.

20 The difficulty is when you do this test at
21 nighttime because the individual is supposed to focus on the
22 stimulant 12, 15 inches away. The problem is, is that there
23 is other types of nystagmus that can actually interfere with
24 this. And the primary one in this case is when officers
25 have their rotating lights or flashing red and blue lights

1 going at the time. And that's called -- it creates a
2 nystagmus called optokinetic nystagmus.

3 And so what officers are taught to do is actually
4 turn off their rotating lights. They will have their
5 emergency flashers in the back and the rotating lights so
6 that the individual isn't looking at these flashing lights.

7 And in this case, even though they are not
8 directly looking at the flashing lights, the lights are
9 still flashing and reflecting off the face of the officers,
10 they are reflecting off the tailgate of the pickup and
11 reflecting off the road signs as well. So there are still
12 flashing lights that can create a false type of a nystagmus.

13 Q. Now, Mr. Holder has just entered the screen here off to
14 the left. I can represent to you that Mr. Holder will
15 testify that he saw clues that Mr. Gardner didn't.

16 Is there something wrong with Mr. Holder's
17 positioning about whether he can determine if there is
18 nystagmus or not?

19 A. The instructions are for the officers to accurately see
20 the clues, if you will, that they are supposed to be
21 observed that you are directly in front of the individual.
22 So standing off to one side in the back -- in fact, I
23 believe Officer Holder came into camera view after Officer
24 Gardner completed the first lack of conversion -- I am
25 sorry, lack of smooth pursuit test. The one scan, the

1 second officer is back and off to one side and I believe he
2 is --

3 Q. So we'll back up here. Let me hit play.

4 What is Officer Gardner doing right there?

5 A. Officer Gardner appears to be doing the lack of smooth
6 pursuit, where you go to one side versus the other side in
7 about two seconds.

8 Q. So how many passes do we have before Mr. Holder begins
9 to position himself?

10 A. It appeared like he's just completing the lack of
11 smooth pursuit test. This test is the test where he holds
12 the stimulus out to one side for about four seconds, maximum
13 deviation.

14 Q. While this is playing, can you -- do you have an
15 opinion about whether Officer Holder could accurately
16 determine whether Mr. Shubin had onset prior to 45 or onset
17 at maximum deviation from where Mr. Holder was standing?

18 A. The officer's off to the back and to one side. To do
19 this test correctly and observe the clues, if you will, the
20 officer has to be standing directly in front of the
21 individual.

22 Q. Now, there has been some mention about Mr. Shubin's
23 head moving while Mr. Gardner was conducting the HGN. Would
24 you like me to replay that so you could see if Mr. Shubin's
25 head was moving or not?

1 MR. WARREN: Your Honor, I am going to object to
2 him telling what the video shows. We can all see it for
3 ourselves.

4 THE COURT: You were the one who mentioned it in
5 opening statement, Mr. Warren.

6 MR. WARREN: That's what I mean. It doesn't take
7 an expert to interpret what we are all seeing.

8 THE COURT: Sustained. I will let the jury make
9 that determination.

10 BY MR. RIDDELL:

11 Q. Let me get back to the spot here, the correct spot
12 where Mr. -- oh, jeez.

13 Now, Mr. Holder is stepping up.

14 Is there anything wrong with how Mr. Holder
15 conducts the HGN? And I can stop the video if you like.

16 A. Stop. As I mentioned earlier, the first part of the
17 HGN test is the lack of smooth pursuit, and the standardized
18 technique to get a valid result is that the stimulus, your
19 penlight, goes out to one side and the other side at the
20 speed of two seconds to reach this outer limit and four
21 seconds to reach the other one.

22 It appears that in this video here, it barely
23 makes it one second before they hit the outer parameter, if
24 you will.

25 Q. So Mr. Holder moves the stimulus too quickly?

1 A. Too fast, correct.

2 Q. What about the positioning of Mr. Holder's flashlight?

3 A. Once again, the idea is that the officer is at least
4 able to see the eyes, not so that you have a flashlight
5 directly in the eyes because that will cause the eyes to
6 actually flinch, if you will, just because of the bright
7 light.

8 But, definitely, the individual is starting to
9 raise their hands. I believe this is a unique maneuver on
10 Officer Holder's part to, you might say, veer from the
11 standardized methods.

12 Q. Mr. Shubin's arms are cocked and up by his head there.
13 From reading Mr. Holder's deposition and the report, can you
14 comment on this trick or what Mr. Holder is having
15 Mr. Shubin do with his chin?

16 A. It was described that the individual crosses their
17 fingers, holds their thumbs up and puts their thumbs
18 underneath the chin. The problem is it's not part of the
19 standardized protocol of doing this test. But it also adds
20 one more element is that there is one more stimulus, you
21 might say, involved in this situation where you have the
22 fingers on the outer perimeter of the eyes, as well, where
23 the individual is supposed to be focusing on the stimulus
24 going back and forth, not on his own fingers off to one
25 side.

1 Q. After reading Mr. Holder's police report, his
2 deposition, and viewing this video, do you have an opinion
3 about whether Mr. Holder conducted the horizontal gaze
4 nystagmus in concert with his training and the science
5 associated with it?

6 A. I do.

7 Q. And what is that opinion?

8 A. He did not.

9 Q. Now let's move to Mr. Holder's deposition.

10 You had an opportunity to read Mr. Holder's
11 deposition?

12 A. I did.

13 Q. Okay. And you referenced that in your report, correct?

14 A. I did.

15 Q. All right. Are you looking at a copy of his deposition
16 now or your report?

17 A. Well, just my report.

18 Q. Okay. In his deposition, Mr. Holder, when asked, "So
19 your testimony today is that maximum deviation is the same
20 as 45 degrees?"

21 And Mr. Holder answers, "Correct."

22 Is that correct?

23 A. No. As I described earlier, there is three separate
24 tests. Each one is a distinct test.

25 Q. So if Mr. Holder believes that maximum deviation and 45

1 degrees are the same clue, can you reach an opinion about
2 whether he is looking for nystagmus at the right points for
3 both 45 degrees and maximum deviation?

4 A. I am not certain what he is really looking at because,
5 once again, they are two distinct tests, and at least one of
6 the tests it appears that the flashlight is shining right in
7 the eyes, which is obviously --

8 *(Reported interrupted.)*

9 THE WITNESS: There is three distinct tests,
10 and -- I am trying to remember what I said. I am sorry.
11 Back up a little bit.

12 *(Reporter read back.)*

13 THE WITNESS: The flashlight was directly in the
14 individual's eyes, which is the distraction, if you will,
15 for the test.

16 MR. RIDDELL: I have nothing further, Your Honor.

17 THE COURT: All right. Cross.

18 MR. WARREN: Thank you, Your Honor.

19 **CROSS-EXAMINATION**

20 BY MR. WARREN:

21 Q. Mr. Meneely, you said that you worked at the OSP lab.
22 Is that the one that's been in the news lately?

23 A. Well, the one that's --

24 MR. RIDDELL: Objection; relevance, Your Honor.

25 THE COURT: Sustained. Excuse me.

1 When did you work at the OSP lab?

2 THE WITNESS: I retired nine years ago, I believe.

3 THE COURT: All right. Folks, I am going to ask
4 you to strike any thought that might be in your mind based
5 on a question that was asked by Mr. Warren.

6 Mr. Warren, I am going to caution you in front the
7 jury, do not ask a question like that.

8 Go ahead.

9 BY MR. WARREN:

10 Q. You -- what's the highest degree you have earned?

11 A. Bachelor's degree in chemistry.

12 Q. You have testified before in court that you had a PhD
13 in toxicology, right?

14 A. I have.

15 Q. But you don't have a degree in toxicology, do you?

16 A. If I can explain that, I don't have a higher degree.
17 About a half a dozen years ago, I completed an online course
18 that, after that, I found out that the university wasn't
19 recognized in Oregon and Washington. So immediately after
20 learning that, I discontinued any association to that, and a
21 year after that, the Department of Education actually sent
22 me a letter commending me for my -- my disassociation to
23 that university.

24 Q. Okay. But it's a university that's not accredited and
25 it doesn't even have a campus, right?

1 A. Correct.

2 Q. Just an online university. But you don't have that on
3 your CV anymore, correct?

4 A. Correct, for that reason.

5 Q. And in your CV, you mentioned having a CV. You said it
6 was 14 pages. The one that was given to us was ten pages.
7 So you have since updated your CV since this February report
8 that you wrote in this case, right?

9 A. I have.

10 Q. And do you have that in front of you, sir?

11 A. The newest one, yes, I do.

12 Q. Okay. And that one I also have a copy of it. And you
13 put about 61 courses at the end there from 2016, correct?

14 A. Correct.

15 Q. And those are courses -- was that something in Las
16 Vegas?

17 A. Correct. It's the American Academy of Forensic
18 Scientists.

19 Q. And most of those sessions that you put down as
20 specialized training, it's like a science fair. You walk
21 around, there's posters up, the author may be there, and you
22 wrote all those down as some specialized training that you
23 had, right?

24 A. That's only part of it. Part of the training is actual
25 presentations. Part of the training is actual, what they

1 call poster presentations where the scientists, because I
2 have done this before, stand by their work, and other
3 scientists come and interact with scientists. They have all
4 the research data out there and that's part of their
5 presentation.

6 Q. And one of those entries that you have on your report
7 on Page 11, at least the Page 11 that I have, it says, 2016,
8 fatal toxicity involving 3-Methoxyphencyclidine. Did you
9 attend a training on that?

10 A. There was two trainings that were actually canceled,
11 but, once again, the advantage is that all the scientists
12 are there and still have the ability to interact even though
13 they weren't able to do the presentations. There was at
14 least two presentations that were canceled.

15 Q. And that was one of them, right?

16 A. That was one of them.

17 Q. And you have just recently testified in *State vs.*
18 *Vollendorf*? Did you testify in this case?

19 A. I did.

20 Q. Did you describe for that court and that district
21 attorney when they asked you questions, did you describe
22 that very case -- that very class that was canceled? Did
23 you describe a 15- or 20-minute presentation?

24 A. No. I described that some of these presentations were
25 canceled, and, once again, as I indicated earlier, that I

1 still had the ability to interact with the presenters even
2 though they didn't actually give a presentation.

3 Q. So you list that as specialized training even though
4 the class was canceled?

5 A. Correct.

6 Q. Okay. Mr. Meneely, when did you first view the video
7 of the arrest in this case?

8 A. I received the video the 29th, about two days ago.

9 Q. So that's the first time you had ever seen any of the
10 field sobriety testing or the HGN testing?

11 A. Correct.

12 Q. All right. The HGN testing, horizontal gaze nystagmus,
13 that's an amazingly accurate test, isn't it?

14 A. It is.

15 Q. And that's because the eyes don't lie, right?

16 A. Correct.

17 Q. Okay. And so in this case, you are not actually an
18 instructor in HGN, right?

19 A. No.

20 Q. Okay. So what you have done is you are a scientist,
21 right? A chemist?

22 A. Well, I'm a forensic toxicologist that is also involved
23 in what's called the drug recognition evaluation, which we
24 teach officers specialized techniques, and part of those
25 techniques are called HGN, vertical gaze nystagmus, lack of

1 convergence, taking blood pressure, pulse to provide a more
2 adequate or scientific data for detection of alcohol, drugs,
3 and medications.

4 Q. Right. And that -- you said that's a DRE course?

5 A. Correct.

6 Q. Drug recognition evaluation, I guess?

7 A. Correct.

8 Q. And that's about a two-week course?

9 A. It's a at least two-week course, and then the officers
10 actually go to an on-site place where they -- they call it a
11 wet lab. It's actually on site for practicing their
12 training on individuals actually affected by drugs and
13 medications and alcohol.

14 Q. And your part of that two-week was a lecture that was
15 about two hours, right?

16 A. That's just a part of my participation with the
17 program.

18 Q. Okay. What your training was, you were taught how the
19 chemical tests were conducted, correct?

20 A. That's only a small part of it.

21 Q. But you weren't teaching HGN, right?

22 A. No, because the officers already knew how to do the HGN
23 properly by that time in the DRE course.

24 Q. Okay. But you are -- in the HGN test, you are not the
25 one who instructs people on how to do it, correct?

1 A. No.

2 Q. Correct? No?

3 A. That is correct. I don't instruct people.

4 Q. Now, did you ever see the results of the BAC in this
5 case? The blood alcohol test?

6 MR. RIDDELL: Objection; beyond the scope,
7 relevance to this witness, Your Honor.

8 THE COURT: Let me talk to the attorneys real
9 quick.

10 *(Sidebar conference was had; not reported.)*

11 THE COURT: All right. So you can go ahead and
12 lay a foundation, Mr. Warren.

13 BY MR. WARREN:

14 Q. Mr. Meneely, you had talked about -- one of your
15 statements in the earlier testimony was about validation
16 studies. Do you remember mentioning that?

17 A. Yes.

18 Q. And a validation study is -- the purpose of a
19 validation study is to correlate the HGN findings with a
20 later blood alcohol test result?

21 A. Well, that's just a part of validation studies.

22 Q. Okay. That's -- in terms of the validation of a -- an
23 individual who shows up with six clues on the HGN, using the
24 lack of smooth pursuit, maximum deviation, nystagmus
25 observed and then nystagmus observed at 45 degrees, if an

1 officer got six clues, what do the validation studies show
2 there is a likelihood of a BAC out of that?

3 A. What the validation studies show that -- what they
4 actually do is put it in percentages of likelihood. They
5 state that as 88 percent chance that the blood alcohol is
6 greater than .08.

7 Q. Okay. Thank you. Now, when you mentioned that the
8 officer -- you said -- I think you described the fingers
9 like this, and there may be testimony that's different than
10 that. But, however, if the officer had the individual hold
11 his head still, you said that was veering from protocol or
12 something like that, I think you said, correct?

13 A. Correct.

14 Q. There is nothing in the NHTSA manual, the driving while
15 intoxicated detection and standardized field sobriety
16 testing, you are familiar with the NHTSA guide?

17 A. I am.

18 Q. And there is nothing in there that says you can't have
19 slight variations. In fact, the manual says slight
20 variations don't affect the results, correct?

21 A. Well, once again, you can have some slight variations.
22 For example, you can actually do the HGN test with the
23 person in a hospital and have accurate results as well.
24 But, once again, they have a very strict protocol. That's
25 why they call it standardized test.

1 Q. Sure. But in terms of what the manual says, it says
2 slight variations will not affect the results of HGN,
3 correct?

4 A. Correct.

5 Q. And the -- I think you said you didn't think that
6 Officer Holder could have observed -- did you say he
7 couldn't have observed HGN from where he was standing?
8 Standing back over Officer Gardner's shoulder?

9 A. Well, first of all, you have to be directly in front of
10 the individual to see movement of the eyes. And Officer
11 Holder was back and to one side. His primary job was to --
12 for officer safety, traffic and so on. But, anyway, he was
13 back to one side.

14 Q. And when Mr. Holder -- excuse me -- Officer Holder did
15 do the test, he did stand directly in front. You saw that
16 on the video, right?

17 A. He did.

18 Q. You didn't mention anything in your report about
19 flashing lights. Have you ever given an opinion that
20 flashing lights would affect nystagmus before?

21 A. This has been reported in the science for other causes,
22 nystagmus. It wasn't in my report because I just got the
23 video two days ago.

24 Q. Isn't it typical when police stop individuals and then
25 they perform a DUI that their overhead lights are going to

1 be on?

2 A. Their overhead lights will be on for a period of time.
3 Then once they begin this aspect of the test, they'll go
4 back and turn on -- turn off the overhead flashing lights
5 for the reason I stated.

6 Q. And do you know whether or not that was done?

7 A. According to the video, you can see the lights flashing
8 for the duration of the whole test.

9 Q. Did you watch the entire arrest video?

10 A. There was only about a 30-minute video that was
11 provided.

12 Q. And did you watch the entire thing?

13 A. That 30 minutes, yes.

14 Q. And did you see the field sobriety tests that were
15 could be conducted?

16 A. I saw the HGN, and I believe there was a walk-and-turn
17 and one-leg stand. I believe that was on there.

18 Q. Okay. You didn't give any opinion in your report about
19 those tests, correct?

20 A. No. I was only requested to evaluate the HGN test.

21 MR. WARREN: All right. That's all the questions
22 I have, Your Honor.

23 THE COURT: Any redirect?

24 **REDIRECT EXAMINATION**

25 BY MR. RIDDELL:

1 Q. Sir, regarding the validation test that counsel
2 referred to as 88 percent, that's assuming that the
3 officer -- well, let me ask you this: Is it safe to say
4 that it has a validation percent of 88 percent if the
5 officer conducting it conducts it correctly?

6 A. Yes.

7 Q. And if the officer conducting it is actually seeing six
8 separate clues?

9 A. Correct.

10 MR. RIDDELL: Nothing further, Your Honor.

11 THE COURT: All right. Thank you, sir. You are
12 free to go.

13 *(End of excerpt.)*

14

15

16

17

18

19

20

21

22

23

24

25

1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 25th day of May, 2016.

5
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25